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SHORT FORM ORDER

INDEX NUMBER: 8178-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 06-17-2009
Motion Submit Date: 08-06-2009
Motion Sequence No's.: 001 MD
002 MD

X

ISLAND GASTROENTEROLOGY,

Plaintiff,

-against-

ISLAND ANESTHESIOLOGISTS, P.C. and ANIL PATIL,

Defendants.

X

Attorney for Plaintiff
Garfunkel, Wild & Travis, PC
111 Great Neck Road
Great Neck, New York 11021

Attorney for Defendant
Ryan & Henderson, PC
One Old Country Road, Suite 428
Carle Place, New York 11514

ORDERED, that the motion (motion sequence number 001) by plaintiff to disqualify defendants' counsel is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendant to disqualify plaintiff's counsel is also denied.

This is an action by plaintiff seeking damages for breach of contract, unjust enrichment, fraudulent misrepresentation, conversion and an accounting. Plaintiff commenced the action by the filing of a Summons and Complaint on or about February 28, 2008 and issue was joined by defendants' service of a Verified Answer dated March 26, 2008. The central issue in this action is whether the plaintiff, Island Gastroenterology Consultants ("plaintiff " or "IGC") and defendant, Island Anesthesiologists ("defendant" or "IA") entered into an oral agreement wherein defendant provided anesthesiology services for plaintiff and the fees were divided between the parties on a percentage basis. Defendant Anil Patil ("Patil") is the president and a shareholder of IA. Essentially, plaintiff states that

it had an oral agreement with defendant, which was never reduced to a writing, wherein plaintiff would receive 40% of the fee and defendant would receive 60% of the fees. Plaintiff alleges in the Complaint that defendant breached the oral agreement by failing to remit its share of the proceeds, was unjustly enriched therein and made certain representations to plaintiff which it relied on to its detriment. Plaintiff further seeks an accounting asserts a claim against Patil individually, for fraud.

In their Answer, defendants assert general denials and affirmative defenses and counterclaims. Among the defenses asserted are the statute of frauds, waiver, estoppel, laches and unclean hands. Defendants also seek an accounting and further allege that plaintiff has converted certain equipment which it owns.

Plaintiff now moves for an Order, *inter alia,* disqualifying defendants' counsel, Donald Henderson ("Henderson") on the ground that he is a necessary witness at the trial of this matter. Plaintiff, in an affidavit by Rajiv Saxena, M.D., a part owner of plaintiff corporation, explains that in April of 2002, IG created an endoscopy unit and contracted with a professional corporation, Robert Bernholc, M.D., P.C., ("Bernholc") to provide the anesthesia services in conjunction therewith. Subsequently, Bernholc contracted with other physicians to provide the services, including Dr. Raul Masakayan and Dr. Patil. Bernholc paid IG $60,000.00 per month for the overhead costs associated with the anesthesia services and billed patients for his services. Dr. Saxena states that in early 2007, Dr. Patil approached him and stated that he could provide the services provided by Bernholc on more favorable financial terms. Based on such representations, IG terminated its relationship with Bernholc and entered into an oral agreement with defendant to provide the anesthesia services. Dr. Saxena states that on or about May 1, 2007, the parties entered into an agreement wherein IA would perform the anesthesia services for IG and in exchange, IA would be paid 60% of the revenues resulting from such services. Dr. Saxena further states that IA was going to collect the revenues and remit to IG its share of the funds. Dr. Saxena claims that the agreement was terminable without cause by IG upon 30 days notice and by IA on 90 days notice. This agreement was never memorialized in writing.

Plaintiff states that the parties operated under the terms of this oral agreement for a period of time and attempted to work out the terms of a written agreement. To this end, Dr. Saxena states that on

September 5, 2007, he met with Mr. Bloom (plaintiff's transaction counsel), Dr. Masakayan[1], Dr. Patil and Mr. Henderson. He states that at this meeting, they discussed how to memorialize the terms of their agreement and that it was understood that the 60/40 split (with IG being paid 60% of the proceeds) was previously agreed upon between the parties. Notwithstanding this purported understanding however, the September 5, 2007 meeting admittedly concluded without a formal written document. Thereafter, according to plaintiff, on or about October 29, 2007, IA terminated the (oral) agreement without giving notice as required.

Now, plaintiff moves to disqualify Mr. Henderson from his representation of defendants on the ground that he actively participated in conversations with plaintiff's counsel and was present at the September 5, 2007 meeting. Specifically, plaintiff asserts that defendants will need to call Mr. Henderson as a witness in the trial, and as such, he must be disqualified from representing defendants. Plaintiff alleges that Mr. Henderson will be called to dispute his testimony and that of Mr. Bloom regarding the conversations that transpired at the September 5, 2007 meeting. Additionally, plaintiff states that it may call Mr. Henderson as a witness to testify that the compensation term had already been agreed to and the purpose of the meeting was merely to memorialize the terms in a written document. This would contradict defendants' claims that the parties were still negotiating the terms of compensation at the September 5, 2007 meeting. Based on the foregoing, plaintiff argues that Mr. Henderson must be disqualified as defendants' counsel because he is likely to be a trial witness in contravention of the "Advocate-Witness" rule found in New York Rules of Professional Conduct, Rule 3.7 (formerly Disciplinary Rule 5-102). Moreover, plaintiff argues that since Mr. Henderson "ought to called" as a witness, he must be disqualified.

Defendants oppose the motion to disqualify Mr. Henderson from his representation of defendants. Defendants also cross-move to disqualify plaintiff's law firm from its representation of plaintiff, but only in the event the Court deems it appropriate to disqualify defendants' counsel. Initially, defendants argue that Mr. Henderson should not be disqualified from his representation of IA because, in fact, the parties had never reached an agreement on the terms of compensation. That is, defendants argue, there was never a meeting of the minds and the terms of the parties' relationship was constantly

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[1] Dr. Masakayan was the former partner of Dr. Patil.

evolving. Moreover, defendants annex a copy of a draft agreement, wherein IA was to receive 40% of the revenues and IG was going to receive 60% of the revenues, a materially different term than alleged by plaintiff. Defendants state that IA did not agree to those terms, but nevertheless, IA did begin providing anesthesia services to IG. Another draft agreement was sent to IA but rejected and therefore, defendants paid $60,000.00 to IG on or about July 9, 2007. This was the amount previously paid by Bernhole to IG. Thereafter, another check in the amount of $180,000.00 was remitted to IG.

Defendants state that the purpose of the September 5, 2007 meeting was to negotiate the terms of the proposed agreement between the parties and that the compensation element had not previously been agreed to between them. Defendants argue that no agreement was ever reached and substantial disagreement existed on material terms. After this meeting, plaintiff provided another written document changing the breakdown of compensation, but same was also rejected by defendants. On October 24, 2007, defendants paid plaintiff an additional $200,000.00, but claim that it was paid under pressure by plaintiff and was not correlated to any percentage of collections.

Defendants assert that plaintiff has failed to demonstrate that Mr. Henderson's testimony would be prejudicial to defendants, that Mr. Henderson ought to be called as a witness, or that his testimony is necessary. Defendants state that they do not plan on calling Mr. Henderson as a witness, that his testimony would be cumulative of the other witness' testimony and that Mr. Henderson was not present when the alleged oral agreement was made between the parties. Since the issue in this case is whether such an agreement existed wherein the revenues were to be divided on a 60/40 basis, Mr. Henderson is not a necessary witness on this issue. The negotiations at the September 5, 2007 meeting are not critical since they only demonstrate that an agreement was never reached. Additionally, defendants urge the Court to recognize that Mr. Henderson's testimony would not be prejudicial to the defendants and plaintiff has failed to offer nay proof as to the content of Mr. Henderson's testimony. If necessary, defendants argue, they can call Dr. Patil or Dr. Masakayan to dispute Dr. Saxena's testimony. Finally, since Mr. Henderson's testimony would be consistent with that of Dr. Patil, defendants would not be prejudiced and he need not be disqualified.

In the event the Court grants the motion to disqualify Mr. Henderson, defendants cross-move to disqualify the law firm of Garunkel, Wild & Travis, P.C. ("GWT). Here, defendants argue that since

plaintiff intends to call Mr. Bloom, a member of GWT, to testify regarding the preparation of draft agreements and he was counsel during the September 5, 2007 meeting, GWT should be disqualified from representing plaintiff.

Plaintiff submits opposition to the cross-motion, defendants submit a reply and plaintiff submits a sur-reply which have all been considered by the Court.

Rule 3.7 of Part 1200 of the Rules of Professional Conduct states:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
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> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
>
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
>
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

This rule replaces former Disciplinary Rule 5-102(b) (22 N.Y.C.R.R. §1200.21), which provided that:

> Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

Under the former rules, the Court of Appeals has explained that the "advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party's valued right

to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation." *S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 515 N.Y.S.2d 735, 508 N.E.2d 647 (1987). The Second Department has recently reaffirmed that a party's right to be represented in ongoing litigation by counsel of its own choosing is a valued right which should "not be abridged absent a clear showing - -on which the party seeking disqualification carries the burden – that counsel's removal is warranted." *Goldstein v. Held*, 52 A.D.3d 471, 859 N.Y.S.2d 707 (2d Dept. 2008). *See also, Bentvena v. Edelman*, 47 A.D.3d 651, 849 N.Y.S.2d 626 (2d Dept. 2008)(burden of demonstrating necessity falls upon the party seeking disqualification); *Heim v. Merritt-Meridian Corp.*, 236 A.D.2d 367, 654 N.Y.S.2d 570 (2d Dept. 1997).

The Courts have held that the mere fact that an attorney was involved in the transaction that is the subject of the litigation, or that his proposed testimony would be "relevant or highly useful" is insufficient to warrant disqualification. *Brooks v. Lewin*, 48 A.D.3d 289, 853 N.Y.S.2d 286 (1st Dept. 2008). The test rather, is whether the subject testimony is necessary, "taking into account such factors as the significance of the matter, the availability of other evidence, and the weight of the testimony." *Id. See also, Sokolow, Dunaud, Mercadier & Carreras LLP v. Lachier*, 299 A.D.2d 64, 747 N.Y.S.2d 441 (1st Dept. 2002). Moreover, even if it can be demonstrated that the testimony is necessary, to warrant disqualification, such testimony must also be prejudicial to the client. *Daniel Gale Assoc. v. George*, 8 A.D.3d 608, 779 N.Y.S.2d 573 (2d Dept. 2004).

In the case at bar, plaintiff has not met its burden of demonstrating that disqualification of Mr. Henderson is warranted. Here, plaintiff has not demonstrated that the testimony of Mr. Henderson is necessary in this action. Rather, plaintiff has admitted that the parties were present during the September 5, 2007 meeting and can testify as to what happen. More significantly, it appears that both sides agree that the issue is whether there was an oral agreement regarding the division of the revenue. This oral agreement was purportedly entered into prior to this September 5, 2007, and without participation by Mr. Henderson. Defendants state that they do no expect to call Mr. Henderson to testify at trial on behalf of defendant as any evidence could be elicited through testimony by the parties and would thus be cumulative. Moreover, plaintiff has failed to demonstrate that even if such testimony were necessary,

that defendant would be prejudiced by such testimony. The Court is not required to disqualify Mr. Henderson merely because he represented defendant on the underlying transaction. ***Brooks, supra.***

Based on the foregoing, the motion by plaintiff to disqualify Donald Henderson from his representation of defendants is denied in its entirety. In light thereof, the cross-motion by defendant to disqualify the firm of Garfunkel, Wild & Travis, P.C. is denied.

Counsel are reminded that a compliance conference is scheduled for November 4, 2009 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: October 22, 2009
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.